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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 914

OGDEN DAIRY COMPANY, A CORPORATION, PETITIONER

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE, UNITED STATES OF AMERICA, AND MARVIN JONES, WAR FOOD ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 425) is not reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 445–449) is reported in 157 F. 2d 445.

JURISDICTION

The judgment of the court below was entered on October 21, 1946 (R. 450). The petition for a writ of certiorari was filed January 20, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*) which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The order involved is Federal Milk Order No. 41, regulating the handling of milk in the Chicago, Illinois, Milk Marketing Area, as amended and reissued on June 21, 1940, effective July 1, 1940 (5 Fed. Reg. 2337), and on June 27, 1941, effective July 1, 1941 (6 Fed. Reg. 3130).[1] Pertinent portions of the milk order are printed in the Appendix, pp. 17–20.

QUESTION PRESENTED

Whether there was substantial evidence to support the findings of the War Food Administrator that (1) the average butterfat tests which petitioner submitted were unreliable and could not be accepted as a basis for determining petitioner's obligation; and (2) the average butterfat tests used by the Market Administrator in determining petitioner's obligation were based on tests of representative samples of petitioner's products.

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[1] The Act and the Milk Order involved in this case were before this Court in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110 (1942); and *United States* v. *Ruzicka* No. 54, this Term, decided December 16, 1946.

STATEMENT

Petitioner is a milk handler subject to Order No. 41 (R. 455–469). During each of the months involved (July 1940–March 1942) it had purchased milk from the Pure Milk Association, a milk producers' cooperative marketing association, which it processed and distributed in the form of fluid milk, cream and other products.

The milk order fixes a use value, uniform as to all handlers, for each of the classes of milk by applying a minimum price to each class. The price applied to Class I, or fluid milk, is the highest; the prices applied to Class II, III, or IV milk (that milk the butterfat of which is used to make cream, ice cream, butter, cheese or other products) are progressively lower (Order, Sections 941.4, 941.5; R. 459–464). Each handler is required to report to the Market Administrator the quantity of milk used in each class during the preceding monthly delivery period. The total of the use values of milk purchased by all handlers from producers is divided by the total quantity of milk so purchased. The result is a uniform price which all handlers must pay producers. The variance among handlers in the percentage of milk used in a given class will normally mean that the use value for a handler may be greater or less than payments at the uniform price required to

be made to his producers. Any handler for whom there is a plus difference is required to pay the difference into a producer-settlement fund or equalization pool, while any handler for whom there is a minus difference is entitled to withdraw the difference from the fund. In this manner all handlers are enabled to pay their producers the uniform minimum or blended price regardless of the use to which the milk is put.

If an association of producers is the first handler, that is, if it bought the milk from producers, the association itself pools the milk and accounts to the producer-settlement fund as would any other handler. Such an association is entitled to receive for milk which it sells to another handler not the uniform producer price but the minimum class prices, and the purchasing handler must pay such minimum class prices directly to the association instead of pooling such milk and accounting to the producer-settlement fund. (Order, Section 941.4 (c) (2); R. 460.)

One of the important factors in determining the classification of petitioner's milk, and its consequent obligation, is the average butterfat test of the products it sold. Throughout the period July 1940–March 1942 petitioner purported to make numerous butterfat tests of samples of each of its products, from which it computed monthly average butterfat tests. In any event, it reported monthly average tests and paid Pure Milk Asso-

ciation upon the basis of the classification computed therefrom.

Section 941.3 (b) (R. 459) of the milk order requires the Market Administrator to verify, or check the accuracy of, the handler's report and payments. This is accomplished by an audit of the handler's books and records, and by sampling, weighing, and making butterfat tests of the handler's receipts and dispositions of milk. In discharging this responsibility, the Market Administrator's technicians carried on a program of sampling and testing petitioner's products in all the months involved. The monthly averages determined upon the basis of the tests made by his technicians were almost invariably lower on each product than petitioner's reported averages.

The average tests of products affects the classification of the total quantity of milk received from producers in two ways. First, the average tests of Class II, III, and IV products affect the amount of milk equivalent to be classified in those classes, in that the amount of milk equivalent is a multiple of the amount of butterfat so classified, which is itself a multiple of the poundage of the product and its average test. Second, the average tests of products in all classes affects the amount of unaccounted for butterfat. If the total dispositions of butterfat is less than the total butterfat receipts, the milk equivalent of the difference is classified in Class IV up to the milk equivalent of

2 percent of the total butterfat, which is allowable as plant shrinkage, and the rest is classified in Class I.

If the Market Administrator used the lower butterfat averages arrived at as a result of his sampling and testing of petitioner's products, it would have the effect of increasing the amount of unaccounted for butterfat to be classified in Class I. An increase in the amount of milk to be accounted for in that class would enhance petitioner's obligation.

The Market Administrator endeavored to verify petitioner's butterfat averages in other ways, by auditing its records and surveying its plant operations. The absence of original records of individual tests and other factors in addition to the regularly consistent variance between the butterfat averages submitted by petitioner and those of his technicians led inevitably to the conclusion that the reported butterfat averages were unreliable. The Market Administrator then computed the petitioner's liability from the monthly averages of the tests independently made by his technicians. This resulted in an additional obligation of $11,463.76 to the Pure Milk Association, which, pursuant to the terms of the order, the handler was ordered to pay (Order, Section 941.4 (c) (2); R. 460).

To review the validity of the Market Administrator's determination the petitioner filed an administrative petition under Section 8c (15) (A) which, after a hearing, was dismissed by the

Assistant to the War Food Administrator (R. 363).[2] Petitioner, as authorized by Section 8c (15) (B) of the Act, then filed a bill in the district court to review the ruling of the Assistant to the War Food Administrator (R. 2–8). Issue was joined by the filing of an answer (R. 11–13). The court found the administrative ruling in accordance with law and entered a judgment dismissing the complaint (R. 425–426). The Circuit Court of Appeals held that there was substantial evidence to support the administrative ruling that the obligation was validly imposed, and affirmed the judgment (R. 445–450).

ARGUMENT

I

The Market Administrator has the duty of verifying the reports and payments of a handler by (1) auditing the books and records to ascertain the receipts and disposition of all milk required to be reported, and (2) by weighing, sampling and testing for butterfat content the milk received from producers and any product of milk upon which classification depends (Order, Section 941.3 (b); R. 459).

[2] The functions of the Secretary of Agriculture under the Act were transferred to the War Food Administrator by Executive Orders No. 9322, 9334, and 9392 (8 F. R. 3807, 5423, 14,783). The administative ruling in this case was made by an Assistant to the War Food Administrator who acted for the Administrator pursuant to authority delegated (8 F. R. 8087) under the Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 516a *et seq.*

It is obvious that the final determination of a handler's obligation cannot be left to the independent calculation of the handler. The handler's monthly report must be audited to ascertain its accuracy and conformance with records of actual receipts and utilization of milk. Where, as here, the petitioner's minimum liability is dependent upon the average butterfat tests of its products, independent sampling and testing is essential to verification.

The Market Administrator first endeavored to ascertain the reliability and accuracy of the butterfat averages set forth in petitioner's reports by audit of its relevant books and records. The evidence clearly established, however, that for the months July 1940–April 1941 petitioner did not maintain the original records of the individual tests of ordinary milk purported to have been made from which the averages it submitted ostensibly were computed. Whether the averages reported during that period could be relied upon as genuine, from how many tests they were computed, and what were the results of those tests, could not be ascertained from the records. After May, 1941, the records show what are claimed to be the results of individual tests on regular milk. As to the manner in which the results of these tests were recorded, petitioner's own witnesses testified that they were recorded on scraps of paper or cardboard, the ice box door, the cuff of the tester's shirt, or sometimes committed to

memory (R. 83–85, 123–125, 129, 150–152). It appeared also that if such tests were actually made, the records of them were destroyed within 24–48 hours after they were transferred to records presently available. The importance of preserving such original records of all tests was impressed upon the petitioner but despite promises to maintain such records (R. 207–209), none was ever produced (R. 83–84, 112–113, 129). Such a haphazard procedure could hardly have achieved a consistently accurate recordation of results. Left without substantial records from which to verify petitioner's report, the Market Administrator was faced with the choice of accepting petitioner's reported butterfat averages at face value or of employing those computed by his technicians upon the basis of independent tests of petitioner's products conducted by them. In view of all the evidence his choice was clear.

The unavailability of any original records of tests to support the petitioner's reported averages is but one factor supporting the finding that the averages reported by petitioner could not be relied upon. Their unreliability is further attested by the fact that petitioner's average tests were higher than the averages derived from tests made by the Market Administrator's expert technicians in twenty of the twenty-one months involved in this case (Exs. 9–19). During the period June 1941–March 1942, the method of sampling employed by the Market Administrator conformed to

that which petitioner urged was necessary to obtain representative samples of its products. Nevertheless, petitioner's averages on other products and on regular milk subsequent to June 1941 are higher than the Market Administrator's averages with just as great a regularity as before that date when the Market Administrator was verifying the petitioner's reported averages of ordinary milk by spot sampling and testing its products.

The evidence shows further that tests were reported for homogenized milk during the months July 1940–August 1941, when admittedly no tests of the product were made. The average reported was the same as for ordinary milk, although homogenized was produced from a lower-test raw milk (R. 161–163). Petitioner also reported tests on ordinary milk purported to have been made on days when the Market Administrator's technician, David F. Russell, was in the plant surveying operations and testing throughout the day. He testified, however, that the petitioner took no samples and ran no tests on those days (R. 128, 195–196). There also is evidence that petitioner's testing facilities were inadequate to carry on the elaborate testing program it purported to conduct (R. 196–197, 201).

The record is clear and convincing that the petitioner's reported averages were unsound and unreliable. The absence of records from which the Market Administrator could verify their genuine character and accuracy and the apparent discrep-

ancies in the testimony of petitioner's own witnesses concerning the operations of the company prompted the Circuit Court of Appeals to observe that "facts and circumstances appear from plaintiff's own witnesses in connection with the destruction of the original records of butterfat tests that could well have caused the trier of the facts to look askance at plaintiff's records that were preserved for the purpose of reports to the administrator." (R. 448.)

II

The fact that the petitioner's reports could not be relied upon did not relieve the Market Administrator of the responsibility of determining the petitioner's obligation. He did so upon the basis of butterfat averages computed from tests of petitioner's products made by his technicians during every month in question. During the period July 1941–March 1942, his technicians were stationed in the main plant and employed a system of multiple sampling of petitioner's products on an average of more than seventeen days each month. Of regular milk an average of more than eight samples a day were taken as the milk came off the filler line, and in some cases from the ice box (R. 64–67, 170–172, 188–189). The petitioner does not attack the character of this method of sampling. However, it contends that the system employed by the Market Administrator during the earlier months (July 1940–May 1941) did not produce

representative samples and, therefore, resulted in incorrect monthly averages. During the earlier months, the Market Administrator followed his usual program of testing an average of slightly more than twelve samples of regular milk each month, the samples being taken on an average of slightly more than eight days each month. The samples were selected at random mostly from petitioner's ice box through which its entire output passed, except that a few were obtained from vendors at petitioner's plant and a few from the filler line (R. 164–172, 183–188, 192, 193–194, 206). Testing upon the basis of samples so selected produced monthly averages lower than petitioners as consistently as during the period July 1941–March 1942 when multiple sampling was employed.

The method of verifying handlers' reported average tests by the testing of comparatively small numbers of samples of each product, selected at random each month was the established practice of the Market Administrator's office. It was the theory of this system that such a random selection would afford a fair cross section of samples, and that the averaging of tests made on several samples so selected over the course of the month would closely approximate the true average for the entire product. Petitioner contends that such a method of sampling, however adequate for the purpose of verifying the reports of handlers who standardize their

milk, was not adapted to its system of production. The short answer to this is the fact that the butterfat averages computed from samples so selected, and those taken at substantially regular intervals from the filler line, were consistently lower than petitioner's. This tended to confirm that under each system representative samples were obtained. Mr. G. E. Dickson, who had charge of the marketing service section of the Market Administrator's office since September 1939, testified that—"there is * * * practically no difference between the monthly average obtained by us and those of the handlers who took the samples daily" (R. 172). He said that a system of spot checking will give high tests as well as low tests and in the course of a group of samples they will average off so that there will be very little difference between the averages of the spot tests and the plant tests (R. 172, 176, 181). The results disprove petitioner's contention that such a method of sampling was not adapted to its operations.

From all the evidence concerning the relative merits of the two methods of sampling employed in the case it cannot be said that the administrative tribunal erred as a matter of law in holding that the methods employed by the Market Administrator in sampling petitioner's products produced representative samples, and resulted in reliable averages. In these circumstances, his decision should be sustained. *Unemployment Com-*

pensation Commission of the Territory of Alaska v. *Aragan* (No. 25, this Term, decided December 9, 1946); *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304.

The question of the sufficiency of the evidence to support the administrative finding does not present an issue warranting review by this Court. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208. This is particularly true when the administrative finding has been confirmed by two courts below. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 75; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 357; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4.

III

Respondents did not contend, as petitioner asserts (Pet. Br. p. 23), that the Market Administrator was "empowered like the Collector of Internal Revenue or the Personal Property Tax Collector of the State of Illinois to levy an assessment based on an estimate." No assessment is involved. No penalty is imposed. The handler's obligation is determined initially upon the basis of the handler's own report. It is then the duty of the Market Administrator to

verify or determine the accuracy of the report and make such changes in the handler's obligation as may be required to assure that producers are fully paid for their work. No contention was ever made that the Market Administrator's responsibilty was other than this, and the legal issue which petitioner seeks to inject is without merit and not presented by this case.

IV

The petitioner asserts (Pet. 9) that the milk order is so vague as to violate due process of law in that it fails to prescribe in detail how the sampling should be conducted as a basis for determining the average butterfat content of a handler's products. This contention is likewise without merit. The term "average butterfat" is reasonably precise and the evidence reveals that petitioner was not at a loss for its meaning (R. 64–65, 132). The Market Administrator did not question the accuracy of the system which the petitioner proposed to follow, had the petitioner actually and carefully followed it. It is generally recognized that the one method of obtaining a theoretically perfect average test would be to test every bottle of output. Short of this, the purpose is to get reliable monthly averages by employing a sampling system that will afford a reasonable probability of obtaining some higher and some lower testing samples; and assure that a disproportionate number will not be drawn

from the output of a single shipment or a single day. A variety of methods of sampling might be proposed that would achieve this end. It is obvious that there is no lack of precision in the term employed.

The only questions presented relate, therefore, to the adequacy of the sampling and testing methods actually employed. Upon those questions there is substantial evidence to support the findings of the administrative tribunal.

CONCLUSION

The decision below is correct and there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.

APPENDIX

FEDERAL ORDER NO. 41—CHICAGO, ILLINOIS, MARKETING AREA

SECTION 941.3 (b). *Verification of Reports and Payments.*—The market administrator shall verify all reports and payments of each handler by audit of such handler's records, and of the records of any other handler or person upon whose disposition of milk such handler claims classification. Each handler shall keep adequate records of receipts and utilization of milk and shall, during the usual hours of business, make available to the market administrator or his representative such records and facilities as will enable the market administrator to:

(1) Verify the receipts and disposition of all milk required to be reported pursuant to this section, and, in case of errors or omissions, ascertain the correct figures;

(2) Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

(3) Verify the payments to producers prescribed in Sec. 941.8. (R. 459.)

SECTION 941.4 (c). *Responsibility of Handlers in Establishing the Classification of Milk.*—In establishing the classification of milk as required in paragraph (b) of this section, the responsibilities

of handlers in establishing the classification of milk received by them shall be as follows:

(1) In establishing the classification of any milk received by a handler from producers, the burden rests upon the handler who receives the milk from producers to account for the milk and to prove to the market administrator that such milk should not be classified as Class I milk.

(2) With respect to milk, or skimmed milk, disposed of to another handler, the burden rests upon the handler who purchased the milk from producers to account for the milk, or skimmed milk, and to prove to the market administrator that such milk, or skimmed milk, should not be classified as Class I milk: *Provided,* That if verification by the market administrator discloses a higher utilization than that reported pursuant to Sec. 941.3 (a) (1) for milk purchased by a handler from a cooperative association, the market administrator shall notify the purchasing handler and such handler shall pay to such cooperative association, within 5 days after notification by the market administrator, the difference in value of such milk as verified by the market administrator and as reported by such handler pursuant to Sec. 941.3 (a) (1). (R. 460.)

SECTION 941.4 (d). *Computation of Milk in Each Class.*—For each delivery period, each handler shall compute, in the manner and on forms prescribed by the market administrator, the amount of milk in each class, * * * as follows:

(1) Determine the total pounds of milk (a)

received from producers, (b) produced by him, if any, (c) received from other handlers, if any, (d) received from other sources, if any, and (e) add together the resulting amounts.

* * * * *

(3) Determine the total pounds of milk in Class I as follows: (a) convert to quarts the quantity of milk disposed of in the form of milk, except such milk as is used for purposes for which no approval by health authorities in the marketing area is necessary, and multiply by 2.15, (b) multiply the result by the average butterfat test of such milk, and (c) if the quantity of butterfat so computed when added to the pounds of butterfat in Class II milk, Class III milk, and Class IV milk, computed pursuant to subparagraphs (4) (b), (5) (b), and (6) (c) of this paragraph, is less than the total pounds of butterfat received, computed in accordance with subparagraph (2) of this paragraph, an amount equal to the difference shall be divided by 3.5 percent and added to the quantity of milk determined pursuant to (a) of this subparagraph. (R. 460–461.)

SECTION 941.5. *Minimum prices*—(a) *Class Prices.*—(1) * * * Any handler who purchases or receives, during any delivery period, milk from a cooperative association which is also a handler shall, on or before the 15th day after the end of the delivery period, pay such cooperative association in full for such milk at not less than the minimum class prices, with appropriate differentials, applicable pursuant to this section. (R. 462.)

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